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No. 03-1160

IN THE

Supreme Court of the United States

Azel P. Smith, *et al.*,

Petitioners,

v.

City of Jackson, Mississippi, and
Police Department of the City of Jackson, Mississippi,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The parties agree that this case presents only the threshold question whether the ADEA "makes actionable 'disparate impact claims.'" Resp. Br. 4. That is, the dispute is over whether the statute applies to employer practices that have a significant adverse effect on older workers, but that lack a reasonable business justification. Respondents contend that it does not, arguing that the statutory prohibition on age discrimination "does not include the adverse effects of unjustified neutral practices." *Id.* 41.

That position must be rejected because it is contrary to the EEOC's regulations providing that disparate impact claims are cognizable under the ADEA. 29 C.F.R. 1625.7(d). Those regulations are, at the least, reasonable and therefore binding, particularly in light of the Court's decision in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). Moreover, respondents' complaint that disparate impact liability in the age discrimination context invalidates valuable business practices ignores the EEOC's recognition that the scope of disparate impact liability under the ADEA is narrower than under Title VII, as the ADEA extends liability only to business decisions that are not "reasonable," 29 U.S.C. 623(f)(1). The Commission has moreover given the ADEA a practical construction, recognizing that a disparate impact claim is more difficult to make out under that statute than under Title VII. See Pet. Br. 10 n.4. The precise requirements of petitioners' claim, and the appropriate burdens of proof, are appropriately left for the lower courts to consider in the first instance on remand.

The judgment below should accordingly be reversed.[1]

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[1] In their brief, respondents defend the court of appeals' judgment, but notably do *not* defend the principal elements of its reasoning. The Fifth Circuit majority refused to follow the EEOC's disparate impact regulations on the ground that they were analogous to the Department of Labor "opinion letter" at issue in

I. The EEOC's Regulations Are Manifestly Reasonable in Light of This Court's Decision in *Griggs* and Numerous Other Precedents Holding That Parallel Language in Title VII and the ADEA Will Be Given the Same Construction.

The EEOC's disparate impact regulations properly track this Court's holding in *Griggs* that disparate impact claims are cognizable under the parallel provisions of Title VII. The two statutes share the same text and "a common *raison d'être*" and thus are construed by this Court consistently. *Northcross* v. *Board of Education*, 412 U.S. 427, 428 (1973).

At bottom, respondents' attempt to distinguish *Griggs* is contradicted by the *six* different decisions of this Court, discussed in petitioners' opening brief, giving the same meaning to parallel provisions of Title VII and the ADEA. Pet. Br. 14-15 & n.9. Respondents concede, as they must, the "venerable" principle that parallel provisions in such closely related statutes will be given the same meaning absent compelling evidence of a contrary congressional intent. Br. 26. There simply is no such evidence here. The three cases respondents cite to suggest that this Court should depart from the normal rule of statutory construction and should not follow *Griggs* in this case (Br. 26-28) are each easily

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Christensen v. *Harris County*, 529 U.S. 576, 586-87 (2000), or the EEOC "Policy Statement" at issue in *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 256-58 (1991). Pet. App. 10a n.5. In fact, Congress delegated substantive rulemaking authority under the ADEA to the EEOC, which issued the regulations in question pursuant to notice-and-comment rulemaking. See Pet. Br. 30-31. The majority below also believed that there was a direct parallel between the "reasonable factors other than age" (RFOA) provision of the ADEA and a provision of the Equal Pay Act that (according to the Fifth Circuit) precludes disparate impact liability. Pet. App. 17a. In fact, there is a marked contrast between those provisions – and the Equal Pay Act does not in any event preclude disparate impact liability. See Pet. Br. 18, 21.

distinguishable. See *General Dynamics Land Systems, Inc.* v. *Cline*, 124 S. Ct. 1236, 1246-47 (2004) (relying on the distinction between the word "age" in ADEA and the terms "race" and "sex" in Title VII); *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 524-25 (1994) (relying on the distinction between the purposes of attorney's fees provisions in the Copyright Act and the "civil rights context"); *United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 208-12 (2001) (attributing different meanings to the phrase "wages paid" in benefits eligibility and back pay provisions, when prior precedent had explicitly held that one of the provisions had a different meaning).

Nor is it an answer that *Griggs* was decided after Congress enacted the ADEA. Contra Resp. Br. 25, 28. The logic of this Court's decisions is that Congress modeled the ADEA on Title VII and thus intended the two statutes to be interpreted consistently. The Court has repeatedly applied to one statute judicial constructions that were adopted *after* the enactment of the other. See, *e.g.*, *TWA, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985) (extending 1984 construction of Title VII's liability rule to ADEA); *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400, 412 (1985) (extending 1977 construction of Title VII's BFOQ provision to ADEA); *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 756 (1979) (extending 1972 construction of Title VII § 706(c) to ADEA § 14(b)).

Respondents would distinguish these decisions on the ground that "the pertinent prohibitory language in the ADEA is different and narrower than the analogous but broader prohibitory language in Title VII," Br. 28, such that "Title VII does not so much as throw a cross-light on the proper interpretation of the ADEA," *id.* at 6. The most that respondents are willing to concede is that the ADEA is "phrased like," "similarly worded," or has "some similar language" to Title VII. *Id.* at 6, 25, 28.

Respondents' argument flies in the face of the plain text of the statute and ignores the wall of this Court's precedent

assigning the same meaning to parallel provisions of Title VII and the ADEA. In this case in particular, the relevant prohibitory provisions of Title VII and the ADEA are, of course, *identical*. The two statutes match each other word for word, with the sole exception – irrelevant to the question now before the Court – that in the ADEA Congress extended the protections afforded by Title VII from "race, color, religion, sex, or national origin" discrimination to "age" discrimination. 42 U.S.C. 2000e-2(a)(2); 29 U.S.C. 623(a)(2). And the precise parallel is no accident: as this Court has repeatedly recognized, Congress derived the ADEA provision *in haec verba* from Title VII. See Pet. Br. 12-15

Respondents' fall-back argument is that the identical language of the ADEA and Title VII should be construed differently because the statutes do not serve identical purposes. To be sure, the statutes may have different primary concerns when it comes to claims based on disparate *treatment*: the paradigmatic Title VII discrimination claim is more likely to involve a conscious decision to treat employees differently due to animus or a desire to injure or subordinate them. But that does not mean that Congress intended to limit ADEA liability only to the subset of cases in which the plaintiffs claim that they were the victims of purposeful discrimination, much less animus-based discrimination.

To the contrary, both the ADEA and Title VII are concerned with the *effects* of arbitrary exclusion of workers from employment even if those effects do not arise from purposeful discrimination. "[T]he necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988). Just as "Congress directed the thrust [of Title VII] to the consequences of employment practices, not simply the motivation," *Griggs*, 401 U.S. at 432, the purpose of the ADEA – which has the identical prohibitory provisions – is to "promote employment of older persons

based on their ability rather than age," 29 U.S.C. 621(b). Respondents thus ignore on-point precedent holding that the two statutes should be construed identically because they "share common substantive features and *also a common purpose*: the elimination of discrimination in the workplace." *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 357-58 (1995) (emphasis added). See also *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 756 (1979); *Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978); *Northcross*, 412 U.S. at 428.

The EEOC has determined that disparate impact liability is vital to effectuate Congress's intent in enacting the ADEA. See Pet. Br. 27-28. Respondents provide no reason to override the judgment of the expert agency Congress charged with implementing the statute. As petitioners' opening brief demonstrated, disparate impact liability is an important tool for ferreting out subtle, *purposeful* discrimination. Disparate impact claims target discriminatory hiring practices that "could actually exist under the guise of compliance with the statute." *Griggs*, 401 U.S. at 435 (quoting remarks of Senator Case, appearing at 110 Cong. Rec. 13,504 (1964)).

Furthermore, "even if one assumed that [intentional] discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain." *Watson*, 487 U.S. at 990. To combat age discrimination effectively, the ADEA must reach "facially neutral policies" that employers adopt "without recognizing or caring that these policies may have a disparate impact upon older workers." Howard Eglit, *The Age Discrimination in Employment Act's Forgotten Affirmative Defense*, 66 BOSTON L. REV. 155, 222 (1986).

The evidence suggests that indifference to the disparate impact of facially neutral policies on older workers is a pervasive problem. Practices that rest on subconscious age stereotypes cannot readily be attacked on disparate treatment grounds, because disparate treatment claims require proof of purposeful discrimination and thus presuppose that the

employer is aware that it is treating older workers differently. Employers who are otherwise unaware of their implicit ageism construct "rationalization[s]" for facially neutral employment decisions so that they may "attribute their behaviors * * * to another factor that better fits their preferred self-image as reasonably fair individuals." Becca R. Levy, *Eradication of Ageism Requires Addressing the Enemy Within*, 41 THE GERONTOLOGIST 578, 578 (2001) [hereinafter *Eradication of Ageism*]. These rationalizations mask the reality of how "a negative stereotype of age has been *automatically triggered*." *Id.* (emphasis added).

Congress in the ADEA thus sought to combat not only explicit age limits, but also subtler, ostensibly neutral employment practices that are "based in large part on stereotypes unsupported by objective fact, and [are] often defended on grounds different from its actual causes." *EEOC* v. *Wyoming*, 460 U.S. 226, 231 (1983). Recent studies have concluded that "all humans, to varying degrees, are implicated in the practice of *implicit ageism*" – a term the researchers define as "thoughts about the attributes and behaviors of the elderly that exist and operate *without conscious awareness, intention, or control*." Becca R. Levy & Mahzarin R. Banaji, *Implicit Ageism*, *in* AGEISM: STEREOTYPING AND PREJUDICE AGAINST OLDER PERSONS 51 (T. Nelson ed., 2002) [hereinafter *Implicit Ageism*] (emphasis added). The existence of implicit ageism is also confirmed by empirical research. See, *e.g.*, Charles W. Perdue & Michael B. Gurtman, *Evidence for the Automaticity of Ageism*, 26 J. EXPERIMENTAL PSYCHOL. 199, 212 (1990) (describing results of an analytical study that identified "an unintentional and unconscious bias introduced into the processing of social information by age labels and stereotypes").[2]

[2] Discrimination of this sort remains a very serious problem, decades after Congress enacted the ADEA. Researchers have concluded that negative stereotypes about age are in fact *more pervasive* than unconscious race or gender bias. See, *e.g.*, Levy & Banaji, *Implicit Ageism*, *supra*, at 64. A separate 1999 study quantified the extent to which implicit age bias has permeated society: "95% of the participants had negative views of old people; this is a higher percentage than for implicit racism or sexism." Levy, *Eradication of Ageism*, *supra*, at 578. See also, *e.g.*, Marla Ziegler, Note, *Disparate Impact Analysis and the Age Discrimination In Employment Act*, 68 MINN. L. REV. 1038, 1062 (1984); Margaret M. Gembala, Note, *ADEA and the Hostile Work Environment Claim: Are the Circuit Courts Dragging Their Feet at the Expense Of the Harassed Older Worker?*, 7 ELDER L.J. 341, 342 (1999). These biases inevitably make their way into the workplace, because "every socialized individual who has internalized the age stereotypes of their culture is likely to engage in implicit ageism." Levy, *Eradication of Ageism*, *supra*, at 578. See also Robert McCann & Howard Giles, *Ageism in the Workplace*, *in* AGEISM: STEREOTYPING AND PREJUDICE AGAINST OLDER PERSONS 163, 176 (T. Nelson ed., 2002).

The Wirtz Report recommending the enactment of the ADEA is also consistent with the recognition of disparate impact liability. See Pet. Br. 26. Contra Resp. Br. 15-18. The Report targeted employment policies that have a "wholly unintended adverse effect" on older workers, J.A. 78, or "indirectly restrict the employment of older workers," *id.* at 66. Indeed, it even cited as an example of a troubling employment practice exactly the policy at issue in *Griggs*: a high school diploma requirement that will "obviously work against the employment of many older workers—unfairly, if, despite his limited schooling, an older worker's years of experience have given him the relevant equivalent of a high school education." *Id.* at 41. Although respondents often note the Report's concern with "arbitrary" discrimination (*e.g.*, Br. 15, 17), that perfectly describes disparate impact liability: employment practices that adversely affect older workers but have no reasonable justification.[3]

[3] Respondents' further repeated claim that the Wirtz Report stated "that enacting a prohibition on neutral decisions with adverse effects on older workers is 'futile as public policy, and even

II. The EEOC's Construction of the ADEA Represents the Best Reading of the Statutory Text.

Respondents argue that this Court must reject the EEOC's regulations as an unreasonable construction of the ADEA. To the contrary, the EEOC's reading of the statute is not merely reasonable and thus entitled to *Chevron* deference, but is plainly the better one.

1. Preliminarily, we note that respondents' principal textual arguments – that Section 4(a) uses the phrase "because of," which appears in a clause introduced by a comma – are flatly precluded by this Court's precedents. The parallel provision of Title VII is identical. *Griggs* is therefore decisive, for it construes Title VII to recognize disparate impact claims. See *supra* Part I. *Griggs*'s holding rests, contrary to respondents' suggestion, Br. 28-29, on the text of Title VII. *Griggs*, 401 U.S. at 429 ("The objective of Congress in the enactment of Title VII *is plain from the language of the statute*." (emphasis added)). Respondents' position is thus inescapably an assault on *Griggs* itself, a decision that Congress has twice embraced (see Pet. Br. 11-12) and is thus firmly settled as a matter of *stare decisis*, the rule that "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact," *Vasquez* v. *Hillery*, 474 U.S. 254, 265-66 (1986).

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contrary to the public interest,'" Br. 5, quoting J.A. 78; see also Br. 16, 43, is a *gross* mischaracterization. The quoted statement addressed only explicit age discrimination and has nothing to do with disparate impact claims: "The firmest conclusion from this year long study is that the most serious barriers to the employment of older workers are erected on just enough basis of fact to make it futile as public policy, and even contrary to the public interest, to conceive of all *age restrictions* as 'arbitrary' and to concentrate on the prohibition of practices which include this element." J.A. 77-78 (emphasis added).

Moreover, two later decisions of this Court, which respondents inexplicably ignore, ground the recognition of disparate impact liability in the text of Title VII. As this Court explained in *Connecticut* v. *Teal*, 457 U.S. 440 (1982):

> When an employer uses a nonjob-related barrier in order to deny a minority or woman applicant employment or promotion, and that barrier has a significant adverse effect on minorities or women, then the applicant has been deprived of an employment opportunity "because of * * * race, color, religion, sex, or national origin."

Id. at 448. *Watson* reached precisely the same conclusion:

> We are also persuaded that disparate impact analysis is in principle no less applicable to subjective employment criteria than to objective or standardized tests. * * * If an employer's undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply. In both circumstances, the employer's practices may be said to "adversely affect [an individual's] status as an employee, because of such individual's race, color, religion, sex, or national origin."

Watson, 487 U.S. at 990-91.

2. Respondents argue that the phrase "because of" in Section 4(a) requires the plaintiff to demonstrate that the employer engaged in purposeful discrimination. Br. 8. Of course, Title VII contains the identical phrase, so that *Griggs*, *Teal*, and *Watson* squarely preclude this argument. Indeed, the *Watson* plurality specifically employed the "because of" language in concluding that disparate impact claims require precisely the proof of causation that petitioners contend is involved in disparate impact cases:

> Once the employment practice at issue has been identified, causation must be proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions *because of* their membership in a protected group.

Watson, 487 U.S. at 994 (emphasis added).

In an effort to identify precedent to support their contrary position, respondents repeatedly claim that *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604 (1993), held "that the phrase 'because of' in Section 4(a)(1) states a discriminatory intent requirement (and not a mere causation or correlation requirement)." Br. 38. See also *id.* at 8, 39, 40. This assertion is absolutely incorrect. *Hazen Paper* certainly did not call into question *Griggs*, *Teal*, and *Watson*. Instead, in *Hazen Paper*, this Court expressly declined to decide whether disparate impact liability is available under the ADEA, much less hold that such liability is precluded by the phrase "because of." See *Hazen Paper*, 507 U.S. at 611. The Court simply reiterated that *disparate treatment* liability *is* available under the ADEA. See *id.* at 609.

Even putting precedent to the side, however, respondents' argument lacks merit. The EEOC properly recognized that Congress used the single phrase "because of" to encompass not only purposeful discrimination, but also arbitrary measures that disadvantage older workers. Numerous examples illustrate the point. When the inevitable changes in physical condition that accompany aging cause an older employee to fail a mandatory test – such as a strength test, an examination, or even a general physical examination – and lose her job, that loss can be said to have occurred "because of" her age. Similarly, in *Griggs*, the diploma and standardized test requirements had a disproportionate impact on African Americans "because of" their race. And in *Dothard*, height and weight requirements for prison guards

discriminated against women "because of" their gender because they "would exclude 41.13% of the female population while excluding less than 1% of the male population." *Dothard* v. *Rawlinson*, 433 U.S. 321, 329-30 (1977).

Respondents' answer to these examples is unconvincing. They argue: "contrary to petitioners' suggestion, if an employee is denied a job based on a physical strength test, the worker's employment prospects have *not* been adversely affected because of age, but rather because of physical weakness." Br. 39 (emphasis in original) (citing Pet. Br. 23). That is not correct. While it is surely fair to say (as respondents do) that the effect arose "because of physical weakness," it is *no less true* that the effect occurred "because of age." Age is simply a prior step in the causal chain.

2. The structure of Section 4(a)(2) confirms the EEOC's construction. The statute makes it unlawful for an employer

> to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age * * *.

29 U.S.C. 623(a)(2). Respondents emphasize the placement of a single comma in Section 4(a)(2), invoking "the normal rule" that "a comma between statutory clauses generally requires separating the language on either side." Br. 10. (Of course, the text of Title VII – addressed by this Court in *Griggs*, *Teal*, and *Watson*, which rightly conclude that the statute recognizes disparate impact liability – contains the same comma structure.) The common-sense principle of grammar identified by the cases respondents cite is that a clause "*set aside* by commas * * * * stands independent of the language that follows." *United States* v. *Ron Pair Enters.*, 489 U.S. 235, 241 (1989) (emphasis added). Section 4(a)(2) does not follow that structure: because there is no introductory comma after the phrase "to limit, segregate, or

classify his employees," the "deprive * * * or otherwise adversely affect" language is not properly read as "set aside" from the "because of such individual's age" clause.

Because it mixes singular and plural references to the employee, respondents' construction is also contrary to basic principles of grammar. On their reading, Section 4(a)(2) would make it unlawful for an employer "to limit, segregate, or classify his *employees* * * * because of *such individual's* age." The EEOC's construction, by contrast, more naturally separates the singular and plural references in the statute, reading it to prohibit employer conduct "which would deprive or tend to deprive any *individual* of employment opportunities or otherwise adversely affect *his* status as *an employee*, because of *such individual's* age."[4] This Court paraphrased the parallel language of Title VII in exactly this manner. See, *e.g.*, *Watson*, 487 U.S. at 991 ("[T]he employer's practices may be said to 'adversely affect [an individual's] status as an employee, because of such individual's race * * * .'").

Presumably recognizing this flaw in their construction, respondents promptly retreat from their reliance on the comma to argue that "the 'because of' clause refers to and modifies the [remainder of Section 4(a)(2)] as a whole." Br. 10. But if Congress had intended that reading, it would have consistently referred to an employee using the singular form throughout Section 4(a). In any event, respondents do not explain how their position would be advanced even if the "because of" clause did modify the provision "as a whole."

3. The EEOC's reading is also confirmed by the ADEA's RFOA provision, which provides that "otherwise prohibited" conduct is not subject to liability if it is "based on

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[4] To the extent that the comma renders the statute ambiguous, the EEOC's construction is the better one because "a misplaced comma is more plausible than a gross grammatical error, plus the destruction of an apparently intended parallelism." *Crandon* v. *United States*, 494 U.S. 152, 170 (1990) (Scalia, J., concurring, joined by O'Connor and Kennedy, JJ.).

reasonable factors *other than age*" (emphasis added). 29 U.S.C. 623(f)(1) (emphasis added). Petitioners' opening brief identified, and respondents fail to rebut, two inferences from the RFOA provision that strongly support the conclusion that the ADEA recognizes disparate impact liability. See Pet. Br. 19-20. First, the ADEA cannot be limited merely to purposeful discrimination, because the RFOA provision operates on the premise that "otherwise prohibited" conduct includes action undertaken based on "factors other than age." Second, arbitrary action that disadvantages older workers is illegal, for the RFOA provision only exempts from liability conduct that is "reasonable," while unreasonable – but not purposefully discriminatory – employer conduct remains actionable.

Respondents argue that, because the RFOA provision refers to employer conduct that is "based on" non-age considerations, its application turns on "a motive-based inquiry [that] is wholly inconsistent with a disparate impact regime." Br. 14. That is a simple *non sequitur*. The fact that the RFOA provision exempts from liability certain non-age-based differentiations in no way implies the converse – *i.e.*, that only purposeful age discrimination gives rise to liability.

Respondents' construction is also far less plausible than the EEOC's because it reads the RFOA provision out of the statute. Respondents effectively concede that on their view the provision has no independent meaning; their assertion that the RFOA provision merely "*confirms* [when] an action is lawful," Br. 34 (emphasis added), is just their best spin on that point.[5]

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[5] Respondents specifically assert that the RFOA provision serves that "confirm[ing]" role – which, as noted in the text, merely renders the provision surplusage – in mixed-motive and pretext cases. Br. 34. Nothing in the statute's text, structure, or legislative history suggests that Congress intended such a meaning. Further, while the cases that respondents cite do invoke the RFOA provision as evidence of the standard for imposing liability in mixed-motive

Although respondents are correct that this Court has on occasion determined that certain statutory provisions are surplusage, Br. 38, there is a strong contrary presumption. This Court's precedents "express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 113 (2001). Respondents provide no reason to depart from this canon of statutory construction here. And by changing the liability that would otherwise attach – that is, by eliminating liability for a subset of the employer conduct that is "*otherwise prohibited*" under Section 4(a) "where the differentiation is based on *reasonable* factors other than age" – the statutory text expressly rejects the contention that the RFOA provision merely "confirms" the liability rule already established by Section 4(a).

4. Respondents finally argue that the EEOC's regulations impermissibly "equate[] the RFOA provision with a 'business necessity' standard." Br. 48. That is not correct. The regulation does track the reference to "business necessity" in this Court's decision in *Griggs*, but that is because *Griggs* described the standard as requiring an employer to show that the employer practice is "a reasonable measure of job performance." *Griggs*, 401 U.S. at 436. As discussed *supra* at 1, the EEOC has recognized that the ADEA imposes a less rigorous standard than does Title VII.

III. Respondents' Hypothesized Practical Objections to Implementing Disparate Impact Claims Are Contrary to Decades of Actual Experience and Rest on Misstatements of the ADEA's Requirements.

Respondents' remaining contention that disparate impact liability cannot be implemented under the ADEA in a practical fashion also lacks merit. Their claim that employers will be forced to resort to quotas to protect themselves from

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and pretext cases, they do *not* – as respondents contend – hold that the RFOA provision serves *merely* that purpose.

liability, Br. 24, ignores decades of actual experience. The EEOC has recognized the validity of disparate impact claims since at least 1981. Before this Court's 1993 decision in *Hazen Paper*, every circuit to consider the question agreed. See Pet. Br. 10. Even today, three circuits continue to recognize disparate impact liability. Yet respondents are not able to identify a *single instance* over that period of decades in which *any* of their asserted practical objections to the implementation of disparate impact claims under the ADEA have come to pass. That body of actual experience is telling.

There are several reasons that respondents' hypothesized concerns have never arisen in practice. First, and foremost, their claims rest on a mischaracterization of the substantive rule of law. The ADEA does not require employers to impose quotas or anything of the sort. To the contrary, employers are immune from liability so long as the challenged employment practices are "reasonable." 29 U.S.C. 623(f)(1). Employers thus face the prospect of liability only if their policies rest on unreasonable approximations rather than considered judgments. As this Court concluded in *Watson*, "the evidentiary standards that apply in [disparate impact] cases should serve as an adequate safeguard against" undue burdens on employers, as "the high standards of proof in disparate impact cases are sufficient in our view to avoid giving employers incentives to modify any normal and legitimate practices by introducing quotas or preferential treatment." 487 U.S. at 993, 999.

Moreover, in analyzing the question whether practices are reasonable, the EEOC, acting pursuant to Congress's express delegation of interpretive authority, has adopted a construction of the ADEA that is sensitive to the fact that there may well be a greater number of justifiable and beneficial business practices that affect older employees than will adversely affect employees of a particular race, gender, or national origin. The Commission has accordingly recognized that a more lenient standard applies under the ADEA than Title VII. See Pet. Br. 10 n.4.

Nor can respondents fall back upon a "fear" by employers that they will be subject to meritless litigation. This Court has already rejected the argument "that disparate impact liability theory need have any chilling effect on legitimate business practices." *Watson*, 487 U.S. at 993. The Court's expectation has been borne out by decades of actual experience. Disparate impact claims are rarely filed, amounting to just one employment discrimination claim in fifty. John J. Donohue & Peter Siegelman, *The Changing Nature of Employment Discrimination*, 43 STAN. L. REV. 983, 998 n.57 (1989) ("[T]he proportion of disparate impact cases in the * * * Survey * * * was 1.84%."). The reasons are easy to understand: disparate impact litigation is exceedingly expensive for the plaintiffs (as it depends on expert statistical analysis) and is therefore reserved for claims with genuine merit. See, *e.g.*, Eileen R. Kaufman, *Choosing the Insidious Path:* West Virginia University Hospitals, Inc. v. Casey *and the Importance of Experts in Civil Rights Litigation*, 19 N.Y.U. REV. L. & SOC. CHANGE 57, 69 n.113 (1992).

Employee-plaintiffs moreover face substantial hurdles in making out such a claim, a well-known fact that restrains the initiation of litigation and that allows for the early disposition of meritless cases. Plaintiffs must present, at a minimum, significant evidence that a particular employment practice causes a demonstrable disparate impact. Courts evaluating disparate impact claims will not hesitate to grant employers summary judgment or even judgment notwithstanding the verdict after trial in appropriate cases. See John V. Jansonius & Andrew M. Gould, *Expert Witnesses in Employment Litigation: The Role of Reliability in Assessing Admissibility*, 50 BAYLOR L. REV. 267, 287 n.103 (1998); see also, *e.g.*, *Sheehan* v. *Daily Racing Form, Inc.*, 104 F.3d 940, 942 (CA7 1997) (Posner, J.) (according a plaintiff's flawed statistical analysis "zero weight" in deciding defendant's motion for

summary judgment because it would be inadmissible at trial).[6]

Respondents' argument also depends on the assumption that a plaintiff's demonstration of a disparate impact will shift the burden of persuasion to the employer to prove that the challenged practice is nonetheless justifiable. That question is unresolved and not presently before the Court. For example, in the *Adams* case (in which this Court previously granted certiorari to decide whether the ADEA recognizes disparate impact claims) the employer strenuously took the opposite position, arguing that plaintiffs retain throughout the case the obligation to prove that the employer acted unreasonably. Br. for Resps., *Adams* v. *Florida Power Corp.*, No. 01-584, at 10, 36, 38, cert. dismissed, 535 U.S. 228 (2002). And although Congress overruled the holding of *Wards Cove* that Title VII plaintiffs have the burden of proof at all stages of a disparate impact case, see *Wards Cove Packing* v. *Atonio*, 492 U.S. 642, 659 (1989), it has taken no express action with respect to plaintiffs' burdens under the ADEA.[7]

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[6] Nor do disparate impact claims increase the volume of litigation, as they almost always accompany disparate treatment claims that would be filed in any event.

[7] Nor is there merit to respondents' assertion, Br. 20, that a disparate impact standard cannot be implemented under the ADEA because age is not a "dichotomous" variable. No court has reported difficulty with administering a case on this basis. The Americans With Disabilities Act, for example, permits disparate impact claims. 42 U.S.C. 12112(b)(3)(A). Whether one is disabled within the meaning of the ADA is frequently a question of degree. See PollyBeth Proctor, *Determining "Reasonable Accommodation" Under the ADA*, 33 S.W.U. L. REV. 51, 52-53 (2003); *O'Connor* v. *Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312-13 (1996); Keith R. Fentonmiller, *The Continuing Validity of Disparate Impact Analysis for Federal-Sector Age Discrimination Claims*, 47 AM. U. L. REV. 1071, 1122, n.313 (1998).

IV. The EEOC's Regulations Providing That Disparate Impact Liability Is Cognizable Under the ADEA Are Entitled to *Chevron* Deference.

Petitioners' opening brief demonstrated that the EEOC's regulations recognizing that the ADEA provides for disparate impact liability are entitled to *Chevron* deference because they were both (i) issued pursuant to an express congressional delegation of authority, see 29 U.S.C. 628; and (ii) promulgated following notice-and-comment rulemaking, see 46 Fed. Reg. 47,724 (Sept. 29, 1981). See generally *United States* v. *Mead Corp.*, 533 U.S. 218, 229-31 (2001).[8] Particularly in light of this Court's decision in *Griggs* interpreting identical language in the parallel provision of Title VII, the EEOC's regulations represent a permissible, and therefore binding, construction of the statute. See *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).[9]

[8] Respondents note that the Department of Justice has not appeared in this case to defend the EEOC's regulations. However, the Department of Justice often does not appear in civil rights litigation, as the government's self-interest as a defendant causes DOJ to urge a narrow construction of civil rights laws. Congress delegated authority to interpret the ADEA to the EEOC, rather than to DOJ, and (as respondents point out, Br. 45) positions taken by the DOJ in the course of representing government defendants are not entitled to any weight. In any event, respondents omit that the Solicitor General has strenuously defended these very disparate impact regulations in this Court on behalf of the EEOC. See Pet. for Cert. 13-14, *EEOC* v. *Francis W. Parker School*, No. 94-1558 ("While the protection against disparate treatment is of undeniable importance in fulfilling the purposes of the ADEA, that protection alone is incomplete."), cert. denied, 515 U.S. 1142 (1995).

[9] Contrary to respondents' assertion that the regulations merely "assum[e]" the availability of disparate impact liability, Br. 6, 44, the regulations do in fact recognize disparate impact claims, as respondents' *amici* rightly concede. See 29 C.F.R 1625.7(d); 46 Fed. Reg. 47,724, 47,725 (Sept. 29, 1981) (codified as amended at 29 C.F.R. pt. 1625) (citing *Griggs*); Pet. Br. 8. See also, *e.g.*, Pacific Legal Foundation Br. 17 (EEOC "has issued regulations applying disparate impact liability to the ADEA. 29 C.F.R. § 1625.7 (1981)."); Chamber of Commerce Br. 30; National League of Cities Br. 15-16.

Respondents therefore face the substantial burden under *Chevron* of proving that the EEOC's construction of the ADEA is unreasonable.[10] Respondents labor to lower the bar that they must overcome by repeatedly asserting that petitioners must produce "convincing evidence" of Congress's intent to recognize disparate impact liability. See Br. 2, 4, 5, 11, 25. That argument relies on language plucked out of context and thus lacks merit. In *General Building Contractors Ass'n, Inc.* v. *Pennsylvania*, 458 U.S. 375 (1982), the Court held that 42 U.S.C. 1981 – which originally "was enacted as a means of enforcing the recently ratified Fourteenth Amendment," *id.* at 389, a provision that itself reaches only purposefully discriminatory conduct – does not recognize disparate impact claims. The Court explained: "Although Congress might have charted a different course in

Respondents also mischaracterize the import of the predecessor Department of Labor guidance. In fact, the DOL did provide for disparate impact liability. See Pet. Br. 8, 33-34; see also Br. of *Amicus Curiae* National Employment Lawyers Association and Trial Lawyers for Public Justice 4-14. Respondents' contrary reading of that guidance rests on its selective use of quotations showing that the ADEA is *also* concerned with purposeful age discrimination – a fact that no one disputes and that does not negate the other provisions of the DOL guidance that are only consistent with disparate impact liability.

[10] Or at the very least, respondents must establish under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), that the regulatory provision is an "impermissible" construction of the statute notwithstanding the EEOC's consistent position and delegated expertise in administering the ADEA. See Pet. Br. 36-37 n.22 (citing *Alaska Dep't of Envtl. Conservation* v. *EPA*, 124 S. Ct. 983, 1004 (2004)).

enacting the predecessors to § 1981 than it did in proposing the Fourteenth Amendment, we have found no convincing evidence that it did so." *Id.* at 391. When this Court concluded that there was no "convincing evidence" that Congress intended Section 1981 to reach nonpurposeful conduct, it was thus not stating a general presumption against finding disparate impact claims cognizable; rather it was making the far more limited point that, in light of the connection between Section 1981 and the Fourteenth Amendment, there was no evidence to overcome the conclusion that the two provisions should be interpreted consistently with one another.

Nor is there a broader background presumption against the recognition of disparate impact liability under the civil rights statutes. Contra Resp. Br. 4, 32-33. Respondents' reliance on the failure of some other statutory schemes to recognize disparate impact liability ignores that the nation's principal civil rights statute – Title VII – does recognize disparate impact liability, and that Title VII was the model for the ADEA provision at issue in this case. Respondents also ignore the availability of disparate impact liability under the Americans with Disabilities Act, see *Raytheon Co.* v. *Hernandez*, 124 S. Ct. 513, 519 (2003), and under the Voting Rights Act, see 42 U.S.C. 1973, 1973c.[11]

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in petitioners' opening brief, the judgment should be reversed.

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[11] At the *very least*, there was no such background assumption when Congress enacted the ADEA, for there were at that time only a small number of precedents of this Court even arguably construing a single statutory provision to require proof of purposeful discrimination. See, *e.g.*, *Radio Officers' Union* v. *NLRB*, 347 U.S. 17 (1954) (construing Section 8(a)(3) of the NLRA).

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